UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

ARLINGTON METALS CORPORATION

And

CASES 13-CA-122273
13-CA-125225
13-CA-133055

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 1216, AFL-CIO, CLC AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION AFL-CIO (USW)

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Melinda S. Hensel
Counsel for the General Counsel
National Labor Relations Board
Region 13
209 S. LaSalle Street, 9th Floor
Chicago, IL 60604
Tel: (312) 886-4886
Fax: (312) 886-1341
Email: Melinda.hensel@nlrb.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION [1]

When Respondent's Vice President of Operations Tim Orlowski explained, at long last, that the elusive "180,0000 ton threshold" that Respondent claimed it had to meet before it would be willing to grant wage increases that had stymied bargaining for the better part of four years had to do with the "optimization" of his equipment you could have heard a pin drop in the gallery among the Union's spectators. [2] (Tr. 77-78, 80, 84-85). More than any other piece of evidence in the hearing, Orlowski's admission illustrated the lack of good faith in Respondent's entire approach to bargaining. This target was impossible to reach—the last time Respondent achieved this level of production it employed approximately twice as many employees. (Tr. 71-72, 98) And since Respondent offers various types of processes to its customers, each of which has different levels of costs and profitability, this target has no meaningful relationship with profitability. Respondent offered this number, not because it was a genuine benchmark to determine whether it could afford wage increases, but as a way to avoid ever reaching an agreement, since it knew that it was an impossible goal.

---

[1] In this brief, Arlington Metals Corp. will be referred to as "Respondent;" the United Steelworkers Union will be referred to as "the Union," or "the Charging Party;" and the National Labor Relations Board will be referred to as "the Board." With respect to the record developed in this case, citations to pages in the transcript will be designated as "Tr." followed by the page number. The General Counsel's exhibits will be designated as "GC" followed by the exhibit number. Respondent's exhibits will be designated as "R" followed by the exhibit number. The Charging Party's exhibits will be designated as "CP" followed by the exhibit number.

[2] Respondent is a metal finishing processor, and occupies a 140,000 square foot facility where it maintains equipment to slit, shear, stamp and blank steel coils provided to it by the customer in a process called toll processing (Tr. 44-54; GC 18(a)-(c); GC 19-21). Depending on the work specifications an order may have value added for additional processing requirements, in addition to price differentials for coil weight, number of cuts, run in cores, and the shape, surface, dimensional tolerance or other special instructions (Tr. 59-61; GC 21). Respondent also offers whole package deals called metal sales in which it supplies the steel, warehoused at its facility, and finished to customer specifications (Tr. 61-62; GC 22-23). There are many parameters that affect the Company's revenue (Tr. 63). The bargaining unit at issue here encompasses both the toll processing and metals sales divisions of the business (Tr. 122-21); GC 2(a); GC 3(a)).

Respondent not only set up a goal that was impossibly high to reach, it also made sure that the Union could not completely understand Respondent's position. Up to the point of Orlowski's testimony, the Union had no idea what was the actual basis for Respondent's long-held bargaining position and worse, had been misled by intentionally confusing characterizations for the source of this benchmark. Respondent did not approach bargaining in this case with any intent to reach agreement, and strategically withheld relevant and necessary information to frustrate the bargaining process.

A little history is necessary to set the stage for the violations alleged here. The parties have been negotiating for an initial collective-bargaining agreement since the Union was first certified in October 2007 (GC 2(a)).[3] In 2008, Respondent reduced the bargaining unit by nearly half, to approximately 25 employees. In 2009, Respondent cut bargaining unit wages and introduced a proposal to reinstate the cuts or provide a bonus to employees if the plant processed at least 180,000 tons of steel annually (Tr. 134-35; R 3). Respondent asserted in a 2009 Business Plan that it had lost up to one-third of its business and business conditions were dire, but it did not reference a 180,000 ton benchmark (GC 17). Nonetheless, in mid-2009 Respondent implemented a last, best, and final offer incorporating the 180,000 ton benchmark (R 3). Respondent has maintained this benchmark throughout subsequent bargaining, even though it modified its implemented terms in 2012, during a period in which numerous unfair labor practice charges were filed, and the Union survived a decertification petition. (GC 3(a)).

An unfair labor practice charge followed, and Respondent agreed to bargain with the Union with a certification year to extend until July 2014. Respondent returned to bargaining in

[3] The union represents a wall to wall unit in which no delineation is made between the toll processing versus metal sales portions of Respondent's business (Tr. 183). Subdistrict Director in District 7, Sub 1 Jose Gudino also testified that he understood that the Union represented all production, maintenance and shipping and receiving employees of Respondent (Tr. 243).

2013 entrenched in its position that modified terms it had implemented in 2012 and the corresponding 180,000 ton production threshold were the only viable option to reach agreement (Tr. 201, 209). As lead Union negotiator Bill Gibbons ("Gibbons") aptly described, he told Respondent's lead negotiator William Miossi at the meeting on October 31, 2013, "We don't know how to handle the situation not knowing what the Company's business plan is, what the Company's margins are, whether the Company is making money or the Company is not making money, what profits and losses are. And that we -- we really needed to address this issue. We wanted to be reasonable and get it done" (Tr. 196; GC 5; R 15). However, Respondent had no interest in concluding an agreement with the Union. (GC 5; GC 15; R15; R16).

As a result of Respondent's specific factual representations and thinly veiled inability to pay claim at bargaining on October 31, 2013, the Union requested information on December 11, 2013, seeking to verify Respondent's specific claims of poor business conditions and its general claim that the implemented terms were "the best the Company can do" (Tr. 206-08; GC 1(s); GC 5; GC 15; GC 11; R15; R 16). Respondent refused to provide the Union the information it requested, because, Respondent claimed, it had never made an inability to pay claim and the Union was not entitled to the information (GC 12; GC 13; GC 14). Respondent did provide raw tonnage and revenue information, but as we learned at hearing, the information was inaccurate and incomplete because it included only toll processing figures, even though its metal sales business factors into Respondent's bottom line (Tr. 92-98; GC 12).

With bargaining on hold due to Respondent's refusal to respond to the information request, on July 10, 2014, one day after the certification year extension expired, Respondent withdrew recognition from the Union based on an employee petition, without bothering to authenticate the signatures, and while serious unfair labor practice charges were pending. (Tr.

101-102; GC 15-16). Simultaneously with the withdrawal of recognition, Respondent denied the Union's legitimate request for plant access to conduct a health and safety inspection, a right granted under the 2009 and 2012 implemented terms (Tr. 246-47, 254-55; GC 4; R 3).

Respondent never had any intention of reaching agreement with the Union, and bargained accordingly. It refused to provide information that would allow the Union to understand its position, and what little information it gave the Union was intentionally deceptive. It maintained an inflexible and unrealistic bargaining position for as long as it took until it ran out the clock on the extended certification year, and then withdrew recognition and denied the Union its contractual right of access based on a petition that it could not have been certain represented the uncoerced wishes of a genuine majority of its unit employees. This cynical and manipulative conduct is the antithesis of an employer's duty under the law.

II. RESPONDENT BARGAINED IN BAD FAITH IN VIOLATION OF SECTION 8(a)(1) and 8(a)(5) OF THE ACT.

The evidence presented at hearing clearly demonstrates that Respondent bargained in bad faith by surface bargaining with the Union as alleged in Paragraph VII(b) of the Complaint, and by refusing to provide the Union with necessary and relevant information as alleged in Paragraph VI(c) of the Complaint.

A. Respondent's conduct at the bargaining table, particularly its stubborn insistence on the facility meeting an arbitrary goal before any change in wages would occur underscores that it had no intention to bargain in good faith.

"Good-faith bargaining 'presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.'" *Public Service Co. of Oklahoma,* 334 NLRB 487 (2001), enf'd 318 F.3d 1173 (10th Cir. 2003) (quoting *NLRB v. Insurance Agents' Union,* 361 U.S. 477, 485 (1960)). Section 8(d) of the Act does not require parties engaged in collective bargaining to agree on their respective proposals, but does require more than a willingness to enter upon a sterile discussion of union-management differences." *NLRB V. American Nat'l Ins.*, 343 U.S. 395, 402 (1952); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). Parties must enter discussions with open and fair minds and with the purpose of reaching agreement. *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960), reh'g den. 277 F.2d 793 (5th Cir. 1960); *Majure Transport Co.v. NLRB,* 198 F.2d 735, 739 (5th Cir. 1952). Thus, an employer is "obliged to make some reasonable effort in some direction to compose his differences with the union ...." *Atlanta Hilton & Tower, supra.,* quoting *NLRB v. Reed & Prince Mfg. Co.,* 205 F.2d 131, 135 (1st Cir. 1953), cert. den. 346 U.S. 887 (1953).

Respondent engaged in surface bargaining by maintaining a take or leave it position with no intention to reach agreement. Surface bargaining is the antithesis of collective bargaining and is contrary to the Act's fundamental tenet of "encouraging the practice and procedure of collective bargaining." *K Mart Corp.,* 242 NLRB 855, 876 (1979). Surface bargaining is defined as "going through the motions of negotiating," without any real intent to reach an agreement. *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977). When a party abandons the "give and take" of collective bargaining and replaces it with a take-it-or-leave-it offer, a tactic condemned by the Supreme Court, it is engaged in surface bargaining. *NLRB v. Ins. Agents Union,* 361 U.S. at 485; *Winn-Dixie Stores, Inc.,* 243 NLRB 972, 974 (1979). The Board will examine whether advancement of a proposal will advance negotiations by affording a basis for discussion, and whether the justifications for a proposal are reasonable. *NLRB v. Reed & Prince Mfg. Co.,* 205 F.2d 131, 139 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953). If on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract, it is surface bargaining. *Reichold Chemicals,* 288 NLRB 69

(1984), aff'd in relevant part 906 F.2d 719 (D.C. Cir. 1990). Respondent engaged in each of these unlawful tactics.

1. Respondent Made General Claims of Inability to Pay and Specific Claims of Higher Costs and Competition In The October 31, 2013 Bargaining Session

On October 31, 2013, Respondent and the Union met for the first time since March 2012 to pick up where they left off following Respondent's unilateral implementation of its last best and final offer in January 2012 (Tr. 186; GC 4; GC 5). Miossi, Respondent's attorney and chief spokesperson, displayed no interest in compromising or concluding an agreement with the Union. Rather, as confirmed by the parties' respective bargaining notes, Respondent ignored the give and take of collective bargaining, was unwilling to discuss alternatives to the implemented terms or provide rational justifications for its continued insistence on the 2012 implemented terms which was presented to the Union as a take-it-or-leave-it offer (GC 5; GC 15; R 15; R 16).[4] The most troubling aspect of the implemented terms for the Union was Respondent's insistence that wage cuts issued in 2009 would not be restored, and Respondent would not consider a wage increase until the facility produced 180,000 tons of steel annually (Tr. 187-88; 194-96; 202; GC 4). Gibbons, the Union's chief spokesperson, pointed out at least three times that the 180,000 ton threshold was arbitrary and unreasonable because Respondent had not met that production goal since 2006 and then with twice as many employees as were currently in the bargaining unit, and repeatedly requested the Company's basis for its insistence on the tonnage threshold (Tr. 187-88; GC 5; GC 6; R 15). In hopes of generating discussion and compromise to reach agreement, the Union presented its eleventh economic proposal (Tr. 191-92; GC 8).

---

[4] Miossi's testimony concerning the events at bargaining is "a general statement to what happened," and his bargaining notes are "pretty brief." (Tr. 392, 398; R9; R 10).

In response to the Union's inquiry for the basis of the 180,000 ton threshold, Miossi vaguely said that it was related to the operating costs of the business, he was not talking about profit and losses, it had to do with cost and pricing, and business had eroded (Tr. 197-99; GC 5; R 15).[5] Notably, at hearing, Respondent's executive vice president, Orlowski, revealed Miossi's explanation to be bogus. When questioned how the 180,000 tons related to the operation of the plant, Orlowski replied "Well, simply put, the 180,000 tons is a utilization of that facility. . .That equipment, those assets, are capable of doing 180,000 tons" (Tr. 77-78). In response to how 180,000 tons full utilization of the facility relates to operating costs of the company, Orlowski did not understand the question and defined operating costs as various fixed and variable costs like gas and electric, and reaffirmed the figure relates only to the utilization of equipment (Tr. 80-81):

> CGC MURPHY: So, what you're telling me is that this 180,000 ton number doesn't have any relation to operating costs?
> . . .
> THE WITNESS: 180,000 tons is the utilization of that equipment. As the – as the owner, it's in fact my prerogative to want 180,000 tons – want my assets utilized.

Back at the bargaining table, Miossi told the Union that business conditions had not improved since 2009 when Respondent first implemented the threshold, and its proposal did not reflect reality (GC 5; R 3; R15).[6] Miossi went on to opine that the threshold figure should actually be higher and Respondent had shown the Union tonnage and revenue data (GC 5; R 15). Miossi cut conversation short, stating "this is turning into a debate" and the Union was "not looking at the whole picture." (GC 5; R 15). Gibbons tried again, and asked whether the

---

[5] Respondent's notes include no reference Miossi's statement of operating costs as the basis for the 180,000 ton threshold but otherwise corroborate the Union's notes (R 15).

[6] According to an internally created 2009 Business Plan (GC 17), the situation was dire, but the business plan does not mention the 180,000 threshold as a basis for assessing company health (Tr. 72-73; GC 17). Respondent's notes leave out Miossi's reference to taxes and prices (R 15).

Company was making money, but Miossi asserted it was Respondent's right to "retain that information privately." (Tr. 197-99; GC 5; R 15). Later Miossi said that there had been a recession, taxes were higher, demand was down and prices had eroded, and the fixed wages and benefits the Company was paying were promises it could keep, that morale was good, employees were not leaving and enjoyed working for Respondent (Tr. 197-98; GC 5; R 15).

Gibbons switched tack and backed away from the eleventh economic proposal, and suggested the Union was willing to look at a profit sharing program (Tr. 200; GC 5; R 15). Miossi demanded the Union make a proposal, but then stated "We have implemented terms. We believe these are the best we can do." (Tr. 444-45; R 15). After Respondent caucused Miossi informed the Union that none of its proposals were acceptable and the implemented terms continued to be the Company's proposal because business had become more challenging between 2012 and 2013, there were price cuts, competitors were going after business, and business was moving south to Alabama and Texas (Tr. 201; GC 5; R 15).[7] Gibbons told Miossi the Union was willing to review other ideas or suggestions and asked again if the 180,000 ton benchmark was viable (GC 5; R 15). Miossi stonewalled again and said the Company would only make promises it could keep, it met its obligations, wanted to keep control of its business, and then ended the meeting (GC 5; R 15). On November 11, 2013, Respondent sent the Union an email again rejecting its proposals because they "are not reasonable given the state of the business. Arlington Metals stands on its implemented terms." (Tr.203-04; GC 9).

On these facts, Respondent's conduct at bargaining on October 31, 2013, can only be characterized as single-mindedly obstructionist and intended to reach stalemate, which are hallmarks of surface bargaining tactics.

---

[7] Respondent's notes only reflect Miossi said "Business DOWN" in this sequence.

2. Respondent Made Additional General Claims of Inability to Pay and Again Referenced Specific Conditions Related to Its Bargaining Proposal During the December 11, 2013, Bargaining Session

Respondent's level of cooperation at the December 11, 2013, session only worsened. Because of the representations made by Respondent on October 31, 2013, including that the implemented terms were the best Respondent could do, taxes were higher, prices were softer and business had worsened, the Union began by submitting an information request for financial information to back up those claims (Tr. 205-06; GC 10; GC 11). Miossi stated Respondent would respond as appropriate but objected that the Labor Board had already looked at the request many times and agreed it was inappropriate (Tr. 207-08; GC 10; R 16).

Gibbons dove in and explained again the unreasonableness of Respondent's 180,000 ton threshold in relation to wage increases, but Miossi held firm (Tr. 208-09; GC 10; R 16). He told the Union the Company was offering what was reasonable because the iceberg was melting, there was no turnover and the Company had made commitments it could honor. (Tr. 208; GC 10; R 16). Gibbons reiterated that turnover was not a barometer of fairness, the company may never return to the staffing level it had when it produced 180,000 tons, and the Union's proposal was not exorbitant or unreasonable (Tr. 209; GC 10; R 16). Miossi replied that the Union could sign Respondent's last, best, and final offer because it was a fair deal and there was no turnover (Tr. 209; GC 10; R 16).[8] Gibbons asked when employees could expect a raise, but Miossi responded that business available to process had changed and volume and price were down (Tr. 209; GC 10; R 16). Gibbons asked what companies Respondent considered its main competitors and Miossi responded he did not know but the steel mills were one because they were not

[8] Respondent's notes exclude this sequence, including Miossi's invitation to sign the last, best, and final offer.

outsourcing the work (Tr. 209-10; GC 10; R 16).[9] The Union caucused and determined it was unable to proceed further without the requested information. (Tr. 210-11; GC 10; R 16).

If there was any doubt after the October 31 session that Respondent approached bargaining with the intent to frustrate the process and a single-minded purpose of forcing the Union to accept its 2012 implemented terms if it wanted a contract, Miossi laid that to rest by again inviting the Union to sign the implemented terms.

A. Respondent's Unlawful Refusal to Provide the Union With Relevant and Necessary Information to Substantiate Its Claims is Bad Faith Bargaining.

The General Counsel submits that, given the representations made by Respondent in bargaining, its brazen refusal to provide information to the Union and exacerbated by the incomplete and inaccurate data it did provide, is substantial evidence that Respondent was in fact engaged in surface bargaining and had no intent to reach agreement. The General Counsel further suggests that Respondent's course of conduct in this case implicates the need for a broader duty to produce general financial information if the Act is to attain its central purpose to promote good faith bargaining.

1. Respondent Made a Claim of Inability to Pay and Must Be Required to Substantiate Its Claims By Disclosing Broad Financial Information Requested By the Union.

The refusal to provide relevant requested information is an independent violation of the Act's requirement that parties bargain in good faith. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 436 (1967). It is well-settled that "a party's refusal to furnish relevant information is part and parcel of its overall conduct," and is evidence of surface bargaining. *Bryant and Stratton Business Institute,* 321 NLRB 1007, 1044 (1996), enfd. 140 F.3d 169 (2d Cir. 1998); *Queen*

---

[9] Tim Orlowski in his testimony identified various of Respondent's competitors but he never suggested that steel mills are Respondent's competitors (Tr. 72-73).

Mary Restaurants Corp. v. NLRB, 560 F.2d 403, 408 (9th Cir. 1977). "Good faith bargaining requires full disclosure by the parties of relevant information in order to produce informed, effective negotiations." *General Electric Co. v. NLRB,* 466 F.2d 1177, 1183 (6th Cir. 1972). See also *Curtis-Wright Corp., Wright Aeronautical Div. v. NLRB,* 347 F.2d 61 (3rd Cir. 1965).

In *NLRB v. Truitt Mfg. Co.,*, 351 U.S. 149 (1956), the Supreme Court held that an employer violates Section 8(a)(5) when it refuses to provide a union with requested information required to substantiate an employer's claim that it cannot afford to grant a wage increase sought by the union, and that such an increase would put the employer out of business because national labor policy requires a Respondent to supply information to substantiate its position that it is economically unable to pay a requested wage increase. *Id.* at 149. This policy gives effect to the statutory obligation to bargain in good faith imposed by Section 8(a)(5) and 8(d) of the Act. The court explained, *id.* at 152-153:

> Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of accuracy.

As the Board noted, no "magic words" are required to establish an obligation to provide general financial information, but the obligation arises whenever the employer's statements and actions convey an inability to pay. *Atlanta Hilton & Tower,* 271 NLRB 1600, 1602 (1984). In *Nielsen Lithographing Co.*, 305 NLRB 697, 700 (1991), affd. sub nom *Graphic Communications Local 50B v. NLRB*, 977 F.2d 1169 (7th Cir. 1992), the Board cautioned that an employer's claims must be evaluated based on the particular circumstances:

> We do not say that claims of economic hardship or business losses or the prospect of layoffs can never amount to a claim of inability to pay. Depending on the facts and circumstances of a particular case, the evidence may establish that the employer is asserting that the economic problems have led to an inability to pay or will do so during the life of the contract negotiated.

The Board found inability to pay claims in *Shell Co.*, 313 NLRB 133, 134 (1993) where the employer characterized its financial condition as "a matter of survival." Similarly, in *Lakeland Bus Lines*, 335 NLRB 322, 324-325 (2001), enf. denied 347 F.3d 955 (D.C. Cir. 2003), the Board held that the employer's statement that acceptance of its offer would allow them to "retain your jobs and get back in the black in the short term," and the "future of Lakeland depends on it," sufficient to trigger an inability to pay claim. And in *International Chemical Workers Union v. NLRB*, 467 F.3d 742, 749-754 (9th Cir. 2004) the Ninth Circuit granted review and remanded the Board's finding of no inability to pay claim where the employer said it was unable to afford the union's proposals, would "go broke" and did not disavow the statements by subsequent conduct.

Despite Respondent's protests to the contrary, it repeatedly conveyed the message to the Union that it was unable to pay the Union's demands. Most convincingly, Respondent's own bargaining notes show that on October 31, 2013, as Miossi pushed the 2012 implemented terms again, he told the Union "The company believes that these are the best we can do" (R 15). At other times, Respondent told the Union that Respondent was "meeting its obligations," "making payroll," and was "not willing to take a chance," the Union was "asking the company to make a commitment not knowing future revenue generation" and the Company "will not make it promises it can't meet" (GC 5; GC 10; R 15; R 16). Respondent's additional statement that "the iceberg is melting" further suggests that its profitability was melting away because of the unspecified changes in business. Each of these statements, individually and taken together, convey but one message – that Respondent could not afford the wage and benefit proposal put forth by the Union. It is undisputed that the Union's eleventh economic proposal included wages and benefits that were of greater value than what Respondent offered in its 2012 implemented terms (GC 4; GC 8). While Respondent did not make an explicit statement that it would immediately go broke, go under or fail to survive at some point during the contract term if it accepted the Union's proposal, its statement "the company believes this is the it can do" has only one interpretation – it could not pay. Accordingly, the Union is entitled to review Respondent's broad financial information to verify its claim that the implemented terms were the best it could do, and Respondent engaged in bad faith bargaining when it refused to substantiate the claim

2. Respondent's Made Specific Representations In Bargaining and the Union is Entitled to the Requested Information to Verify Those Claims.

Respondent unfairly accused the Union of failing to understand its business reality and not looking at the whole picture, yet refused to provide any information about its specific assertions. "The *Truitt* principle [regarding the employer's duty to furnish information] is 'not limited' to cases in which the company makes an actual plea of poverty, but [applies] to other situations in which the company possesses data 'relevant' to its bargaining position." *Leland Stanford Junior Univ.,* 262 NLRB 136, 145 n. 13, citing *NLRB v. Pacific Grinding Co.,* 572 F.2d 1343, 1348 (9th Cir. 1978). In *Caldwell Manufacturing Co.,* 346 NLRB 1159 (2006), the Board held that the relevancy of financial information that is not presumptively relevant may be established if the information would assist the union in verifying the employer's claims regarding its proposals and allow the union to make counter proposals. *Id.* at 1160. The General Counsel's burden to show the relevance of the requested information is not exceptionally heavy; the Board uses a broad discovery-type standard in determining relevance in information requests. *Id.* Where the information requests are narrowly tailored to allow the union to evaluate very specific assertions made by an employer and assist it in developing its own proposals, the information is relevant. *Id.*

A result similar to *Caldwell* was reached in *E.I. DuPont & Co.*, 276 NLRB 335 (1985), where the Board held the Employer unlawfully refused to furnish specific financial information it made relevant by its representations in bargaining, such as comparative production cost data for other plants, despite the fact the company had not pled financial hardship. In *A-1 Door and Building Solutions*, 356 NLRB No. 76, *2, 5 (2011), the Board, citing *Caldwell,* supra, and *E.I. DuPont*, supra, found the union was entitled to receive financial information because the union was seeking to evaluate the accuracy of the employer's specific claim of an inability to compete. Likewise, in *National Extrusion & Mfg.*, 357 NLRB No. 8 *2 (2011), enfd. sub nom. *KLB Indus., Inc. v. NLRB,* 700 F.3d 551 (D.C. Cir. 2012), the Board found that while the employer did not assert an inability to pay, it "violated the Act by failing to supply the [u]nion with...requested information relevant to [the employer's] claim of uncompetitiveness."

This case is squarely within the scope of cases holding that an employer must provide a union with relevant requested information that will enable the union to meaningfully evaluate and intelligently respond to Respondent's specific claims in support of its bargaining demand. In bargaining, Respondent was very specific that (1) a wage increase was contingent on reaching an annual production of 180,000 tons as that figure was somehow related to operating costs of the business, (2) its business conditions were as dire as in 2009, (3) prices had softened as between 2012 and 2013 and its customer base was demanding price cuts, (4) taxes had increased, and (5) competitors were going after its business. Respondent, however, refused to substantiate these claims because, in Respondent's own words "The Union is not entitled to such information as Region 13 determined several times, each time affirmed by the General Counsel, because [Respondent] has never asserted a financial inability to meet the Union's wage demands" (GC 12). General Counsel's position is inapposite, once an employer takes a firm stance in bargaining based on specific factual assertions, it must be prepared to disclose the basis for such assertions in order to permit bargaining to progress in a fair and meaningful manner.

The Board has held that audited financial statements, including detailed income statements, balance sheets and cash flow statements are relevant to bargaining even where the employer has not claimed an inability to pay. *See Stella D'Oro Biscuit Co.,* 355 NLRB 769 (2010) (audited financial statements relevant); *Union Switch and Signal,* 316 NLRB 1025 (1995) (audited financial statements); *Caldwell Mfg. Co.,* 346 NLRB 1159, 1160 (2006) (financial reports). Disclosure of these documents would assist the Union in verifying Respondent's broad general claim of poor business conditions and its more specific assertion that conditions had not improved since 2009. Further, as Respondent's executive vice president Orlowski testified, such documents would also lay out tonnage and revenue details, which would permit the Union at long last to meaningfully evaluate Respondent's position that wage increases are contingent on 180,000 ton production threshold.

The Union's request for sales by customer was driven by Respondent's representation that prices had softened and customers were demanding price cuts. The Board has found such customer information to be relevant when it is placed into issue by the employer. See *Tom Ryan Distributors,* 314 NLRB 600, 606 (1994); *KLB Industries d/b/a National Extrusion & Mfg.,* 357 NLRB No. 8, *3 (2011). Without the customer information, the Union was unable to assess whether Respondent was bluffing, if a significant and long-term downturn was in fact occurring, or whether there was a cyclical nature to any downturn.

The Board has additionally found that information about an employer's operations and competitiveness is relevant when put in issue by an employer. See *KLB Industries,* supra.

Respondent unquestionably put those subjects on the table with its comments that competitors were going after its business and it was suffering poor business conditions. Thus, the Union's request for an explanation of Respondent's business conditions and specific changes, data, reports and analyses was relevant and necessary to allow the Union to evaluate Respondent's claims. Finally, the Board has ordered that tax returns be produced at least in the context of inability to pay claims. See *Dover Hospitality Svs.,* 358 NLRB No. 84 (2012), aff'd 361 NLRB No. 60 (2014). The General Counsel asserts that the Union's request was proper in the context of Respondent's specific assertion in support of its bargaining position and claim that business conditions were poor in part due to increased taxes. The Union was thus entitled to verify this specific claim by reviewing the specific information underlying the representation.

Respondent's course of conduct in refusing to provide information regarding its specific representations paints a twofold sinister picture of bad faith – in one Respondent is reluctant to disclose the information because its representations may simply be not true. In the other, there is at least some iota of truth, but Respondent is withholding the information lest the Union come to the conclusion that it should accept Respondent's implemented terms, and thwart Respondent's ultimate goal to reach no agreement. In either picture, Respondent violates the duty to bargain in good faith and to provide relevant and necessary information in bargaining under the criteria of *Caldwell,* supra.

3. Respondent's Production of Inaccurate or Incomplete Tonnage and Revenue Figures is Additional Evidence That It Bargained in Bad Faith.

Respondent's bad faith is additionally demonstrated by that fact that the little information it did produce to the Union – raw tonnage and revenue data – was incomplete and inaccurate. It has long been settled that an employer's lack of frankness in disclosing information that in the context of bargaining is necessary for an intelligent evaluation of its proposals is evidence of bad faith. See *Northwestern Photo-Engraving Co., Inc.,* 140 NLRB 24 (1962). In this case, Respondent's limited response to the Union's information request included raw annual tonnage and revenue figures which Respondent asserted supported its 180,000 ton threshold. However, as we learned at hearing, the figures produced by included only Respondent's toll processing business and left out tonnage and revenue related to its metal sales business, despite the fact the Union represents a wall-to-wall unit that does not distinguish between the two types of work. Respondent's executive vice president Orlowski testified that although toll processing and metal sales are calculated on separate balance sheets, the figures appear on a single profit and loss statement. Respondent's failure to produce complete tonnage and revenue data must be characterized as yet another deliberate effort to confuse and withhold information from the Union.

4. This Case Illustrates the Need to Expand An Employer's Duty to Provide Financial Information to Promote Good Faith Bargaining.

The circumstances in this case aptly demonstrate the need for the Board to adopt a broader interpretation of the duty to provide information under *NLRB v. Truitt Mfg. Co.*, 351 US 149, 152-53 (1956). The Board should recognize that an employer's general finances are relevant to negotiations not only when an employer claims it will go broke immediately, but also when the employer puts in issue incomplete or vague facts related to its ability to afford the union's demands, whether or not it has acknowledged its profitability status. This would prevent the gamesmanship that has so clearly taken place during the bargaining in the instant case. The Board in *Coupled Products, LLC,* 359 NLRB No. 152, *4 fn. 6 (2013), acknowledged that "[i]n an appropriate case, we would consider how the Board has distinguished between 'inability to pay' cases and 'competitive disadvantage' claims in post-*Nielsen* cases and whether these distinctions best serve the central purpose of the Act: to promote good faith bargaining. The

General Counsel submits that this case is just such an appropriate case. Respondent, in support of its take-it-or-leave-it bargaining position, put in issue that business was down at least in part because competitors were going after its business while refusing to disclose to the Union whether or not it was profitable.

In *Nielsen Lithographing Co.,* the Board held that an employer asserts an 'inability to pay' claim when it claims either a present inability or a prospective inability to pay during the life contract in negotiation, but a claim of competitive disadvantage is not the same as a claim of financial inability to pay, and "the employer who claims only economic difficulties or business losses or the prospect of layoffs is simply saying that it does not want to pay." *Nielsen Lithographing Co.,* 305 NLRB 697, aff'd. 977 F.2d 1168 (7th Cir. 2001). Following *Nielsen*, the Board decisions became rather inconsistent in prohibiting gamesmanship, allowing employers to make pleas of poverty but giving respite from the duty to provide broad financial information in support of the claim when the statements were later disclaimed.

For example, in *American Polystyrene Corp.,* 341 NLRB 508 (2004), enf. denied sub nom. *Chemical Workers v. NLRB,* 467 F.3d 742 (9th Cir. 2006), the employer stated it could not afford the union's proposals and would go broke. After it retracted those statements, however, the employer continued to make statements such as "times are tough," and "in these uncertain economic times...we need to take a more cautious approach than what you propose." *Id.* at 509-510. Likewise, in *Richmond Times-Dispatch,* 345 NLRB at 195-196, the employer described the downturn as the worst in a decade, and warned "revenue outlook for the rest of the year is bleak" and claimed it was unable to pay a regular bonus. When it refused to provide information in support of its claim, however, the employer asserted it was not unable, but chose not to pay the bonus. *Id.* at 196. In both cases the Board determined that the employers had effectively disclaimed the inability to pay claims. Under the current state of the law, collective bargaining frequently becomes an exercise in brinkmanship as an employer paints a dire picture of its financial outlook to convince the union that concessions are necessary, but is not required to disclose financial information because it has not made a present or prospective claim of inability to pay.

In *ConAgra v. NLRB*, 117 F.3d 1435, 1440 (D.C. Cir. 1997), the court noted that when presented with bleak economic projections but denied the opportunity to independently verify the employer's financial state, a union faces the "'Hobson's choice'" of either holding fast to its wage demands in hope that the employer is bluffing. . . or abandoning wage demands that the employer might in fact have been able to afford easily." In his concurring opinion in *ConAgra,* Justice Wald wrote, "[T]here are sufficiently serious theoretical and practical fissures in the *Nielsen* reasoning itself that the Board should revisit it with an eye to its consistency with the purposes of the [Act]." *ConAgra, Inc. v. NLRB, id.* at 1447-50 (Wald, J. concurring).

Likewise, in *SDBC Holdings, Inc., v. NLRB,* 711 F.3d 281, 295-99 (2d Cir. 2013), in denying enforcement of the Board's finding of an inability to pay claim in *SDBC Holdings, Inc.,*355 NLRB 769 (2010), the Second Circuit held that the Board's decision, without explanation, departed from its holding in *Nielsen,* and while the Board could conclude the duty to provide information had been triggered, it must explain why. *SDBC Holdings, Inc. v. NLRB*, 711 F.3d 281, 292 (2d Cir. 2013). Judge Cabranes explained in his concurring opinion "[i]f a union faced with an employer's claim of unprofitability would give 'serious consideration to making the concessions the employer is demanding, or at least making some concessions' the duty to substantiate can, and generally should, apply." *Id.* at 297 (Cabranes, J. concurring) (quoting *N.Y. Printing Pressman v. NLRB*, 538 F.2d 496, 501 (2d Cir. 1976) in which Judge

Cabranes urged the Board to revisit the concept of "inability to pay cases." Judge Cabranes succinctly explained that in his view of the inequities between *Truitt* and *Nielsen* came about as a result of a literal interpretation of *Truitt's* term "inability to pay" as meaning an employer is broke when it really means the employer has put in issue its ability to *afford* the demand. *Id.* at 296. The Board in *Nielsen* then further confused the issue by referring to "losses of business to competitors" as "business losses," yet a profitable company cannot also incur "business losses." *Id.*, at 297, *citing Nielsen* at 700. Judge Cabranes concluded that, *id.* at 298:

> The Board need not, and should not, perpetuate that mistake. Instead, it can, and should, clarify that an employer's assertion of unprofitability is an assertion of "inability to pay" for labor costs within the meaning of *Truitt.*

Moving a step beyond Judge Cabranes's opinion, however, the General Counsel submits that an "inability to pay" or "inability to afford" a Union's demands is not mutually exclusive or synonymous with a claim of "unprofitability," i.e., it is possible to have one without the other. To hold otherwise would establish another loophole framework in an employer to escape, through carefully chosen words, the obligation to disclose broad financial information in support of its claims. An employer may well say it cannot afford the union demands without claiming it is unprofitable, and likewise may say it is unprofitable without claiming that it cannot afford the demands. In either case, a union may again be thwarted from obtaining relevant and necessary information it requires to bargain intelligently because the employer failed to drop what have become the magic words.

The evidence shows that Respondent has deliberately frustrated the bargaining process by relying on what is clearly an illusory threshold that is unrelated to its profitability as the basis for considering the grant of a wage increase in order to escape its obligation to provide the Union with general information that it requires to assess the reasonableness of Respondent's position.

Respondent asserts that it has not made an inability to pay claim, and on that basis refused to provide the Union with the information. As Judge Cabranes noted in his concurrence, in *Atlanta Hilton & Tower,* 271 NLRB 1600, 1602 (1994), the Board found that there was no "inability to pay" claim where the employer refused to confirm or deny whether it was profitable. *SDBC Holdings, Inc. v. NLRB, supra.* at 296, n.1. The General Counsel urges that the most useful expansion of the *Truitt* rule, or clarification of the *Nielsen* rule, would be to require Respondent to supply information verifying its deeply held position without regard to whether it involves an inability to pay.

The result of Respondent's gamesmanship is that Union is rendered unable carry out its statutory function as exclusive bargaining representative of the bargaining unit and intelligently assess Respondent's proposals and adapt its counterproposals. If the law as it stands under either *Caldwell* or *Truitt* is somehow insufficient to find that Respondent engaged in bad faith bargaining by refusing support its claims, then the law is inadequate to advance the Act's central purpose of promoting good faith bargaining and must be revised.

III. RESPONDENT'S WITHDRAWAL OF RECOGNITION WAS UNLAWFULLY EXECUTED AND THUS IS INVALID.

To effectuate the Act's requirement for employee free choice in choosing an exclusive collective-bargaining representative, there are certain preconditions that the union must meet. One of those is the existence of majority support for the union within the unit. *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996), *Levitz Furniture Co.,* 333 NLRB 717, 720 (2001). The Board has also recognized that, for employees' choices to be meaningful, collective-bargaining relationships cannot necessarily be subjected to constant challenges. Therefore, the Board has enacted measures to balance industrial peace and stability in collective-bargaining relationships with employee free choice. Most important is the presumption that an incumbent union retains its majority status, with limited exceptions. *Levitz*, supra at 720; *Auciello Iron Works*, supra at 785-786. The General Counsel has shown that Respondent's withdrawal of recognition must be invalidated first because the remedy for surface bargaining is a bargaining order and extension of the certification year, second because Respondent withdrew recognition while serious unfair labor practices of the type that might lead to employee disaffection for the Union were pending against Respondent and support special remedies, and third because Respondent failed to authenticate bargaining unit signatures on the petition.

A. Respondent's Withdrawal of Recognition is Invalid Because The Remedy for Respondent's Bad Faith Bargaining is an Affirmative Bargaining Order, Extension of the Certification Year and Other Special Remedies.

Respondent's withdrawal of recognition must not be given effect because, as established by the record and discussed above, Respondent bargained in bad faith, including surface bargaining with no intent to reach agreement, offered a take-it-or-leave-it proposal, and refused to substantiate its general claim of inability to pay and specific factual assertions in bargaining. The remedy for such violations is an extension of the certification year, and therefore Respondent's withdrawal of recognition is ineffective. In *Mar-Jac Poultry Co.,* 136 NLRB 785, 786-87 (1962), the Board held that when an employer's unfair labor practices delay good faith bargaining, the Board may extend the certification year. This is so because when unlawful conduct has disrupted the bargaining relationship, parties must have a reasonable period of time to resume their relationship. *Id.* at 787. In considering whether to extend the certification year, the Board considers "the nature of the violations; the number, extent and dates of the collective bargaining sessions; the impact of the unfair labor practices on the bargaining process; and the conduct of the union during negotiations. *Bryant & Stratton Business Institute,* 321 NLRB 1007, 1007 n. 5, 1045-46 (1996) enf'd 140 F.3d 169 (2d Cir. 1998). In cases such as here, where

Respondent's unfair labor practices have eliminated any progress made during any period of good faith bargaining, it is appropriate to extend the certification year for 12 months to restore the status quo ante. A 12-month extension is particularly appropriate in this case because the evidence shows that Respondent failed to bargain in good faith for the duration of the certification year following its agreement to do so in a prior settlement with Region 13 (GC 3(g)). See *Latino Express,* 360 NLRB No. 112, *27 (2014).

In addition, the General Counsel's request for a reading of the notice in English and Polish is warranted to assure bargaining unit employees that Respondent will respect their statutory rights under the Act and ensure that the notice is disseminated to all employees, including those who do not regularly consult Respondent's bulletin boards. *Federated Logistics,* 340 NLRB 255, 258 and n. 11 (2005), enf'd 400 F.3d 920 (D.C. Cir. 2005); *Excel Case Ready,* 334 NLRB 4, 5 (2001). As established in the record, up to two-thirds of the bargaining unit are Polish speakers for whom the Union has required the assistance of an interpreter since bargaining commenced in 2007. A notice as important as what the General Counsel seeks here must be heard and understood by the broadest possible range of employees.

B. Serious Unfair Labor Practice Charges Pending Against Respondent Invalidated the Withdrawal of Recognition.

In addition, or alternately, and further supporting the General Counsel's request for special remedies, Respondent was prohibited from withdrawing recognition because there were serious unfair labor practices pending at the time of withdrawal. In *Heritage Container, Inc.*, 334 NLRB 455 (2001) the Board, applying the *Levitz* framework, held that an employer may not rely on an anti-union petition it received to withdraw recognition if the employer committed unfair labor practices that reasonably tended to contribute to employee disaffection from the union. In affirming the ALJ's recommendation, the Board found a causal relationship between the unfair labor practices and the petition. The petition was therefore unreliable and could not serve as the basis for withdrawal.

In previous cases the Board has considered whether an employer possesses an alleged good-faith belief of lack of majority union support by utilizing a multi-factored analysis to determine the validity of the employer's belief. The factors typically include: (1) the length of time between the unfair labor practices and the petition; (2) the nature of the employer's illegal acts; (3) any possible tendency to cause employees disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Master Slack Corp.,* 271 NLRB 78, 84 (1984); *Vincent Industrial Plastics*, 328 NLRB 300, 301-02 (1999); *Wire Products Mfg. Corp.*, 326 NLRB 625 fn. 14 (1998).

In *Olson Bodies, Inc.,* 206 NLRB 779, 780 (1973) for example, the Employer withdrew recognition from the union based upon a decertification petition filed by employees at a time when there were serious unremedied unfair labor practices by the employer. In finding that the withdrawal violated the Act, the Board stated:

> Serious unremedied unfair labor practices...tend to produce disaffections from a union and thus remove as a lawful basis for an employer's withdrawal of recognition the existence of a decertification petition or any other evidence of loss of union support which, in other circumstances, might be considered as providing objective considerations demonstrating a free and voluntary choice on the part of employees to withdraw their support of a labor organization.

Applying the factors in *Master Slack Corp.* 271 NLRB 78 (1984) to this case, Respondent withdrew recognition while entrenched in a surface bargaining campaign with no intent to reach agreement and deny the Union relevant and necessary for bargaining. Compounding matters, at the time of withdrawal, unfair labor practice charges in Case Nos. 13-

CA-122273, 13-CA-125225 and 13-CA-119043 were pending against Respondent, alleging, respectively, refusal to provide information in bargaining, refusal to bargain in good faith, and refusal to bargain over the termination of a key member of the Union's support network (Tr. 250; GC 1(a) and 1(c); GC 3(f)- (g)). The timing of the petition is also extremely suspect, coming one day after the expiration of the extension to the certification year (GC 3(g)).

There can be no doubt that Respondent's unfair labor practices fed employee disaffection for the Union. In July 2014, employees had been waiting seven years for a collective bargaining agreement, were subjected to wage cuts in 2009 that Respondent refused to reinstate until employees reached an arbitrary production figure, and multiple other unfair labor practices which included denigration of the Union and encouragement by Respondent to decertify the Union (GC 2(b)-(d); GC 3(b), 3(d)-(e)). After all of that, for employees to watch Respondent continue to insist on a wage package detrimental to their well-being and refuse to provide the Union necessary information in bargaining, and refuse to bargain with the Union about the termination of a key supporter. Under the circumstances, it is little wonder that employees believed they would be better off without the Union and were willing to sign the petition. As cautioned by the Board, a "company may not avoid the duty to bargain by a loss of majority status caused by its own unfair labor practices." *SFO Good-Nite Inn, Inc.* 352 NLRB 268, 277 (2008) citing *NLRB v. Williams Enterprises,* 50 F.3d 1280, 1288 (4th Cir. 1995). Therefore, Counsel for the General Counsel respectfully requests that Respondent be required to again recognize the Union and that the bargaining relationship be extended another year under *Mar Jac* to permit the Union additional time to reach agreement on a contract in this case.

C. Respondent Failed to Properly Authenticate Petition Signatures Prior to Withdrawal of Recognition, and Cannot Establish The Signatures Represent a Majority of the Bargaining Unit.

Finally, the presumption of majority support can be challenged when, as here, no labor agreement is in effect and the certification year has passed. During such times, an "employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit." *Levitz*, 333 NLRB at 725. The Board in *Levitz* explained:

> [A]n employer with objective evidence that the union has lost majority support--for example, a petition signed by a majority of the employees in the bargaining unit--withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5).

In other words, an employer may not withdraw recognition unless it can prove that an incumbent union has, in fact, lost majority support. The burden of proof to demonstrate this actual loss rests on the employer. *Id.*

In *Latino Express, Inc.*, 360 NLRB No. 112 (2014), the Board found that "...where an employer relies on an employee petition for evidence of the union's loss of majority support, it is the Respondent's obligation to authenticate the petition signatures on which it relies." (citing *Ambassador Services*, 358 NLRB No. 130, slip op. at 1, fn. 1 and 3 (2012)). In *Latino Express*, as here, the Respondent made no effort before or at the hearing to authenticate the employee signatures before withdrawing recognition. The Board thus found in *Latino Express* that the petitioner had not authenticated sufficient signatures to achieve a majority supporting withdrawal of recognition. *Id.* at 24-25.

Here, Respondent resoundingly failed to establish it had met its burden to confirm prior to withdrawal of recognition the petition signatures on which it relied were genuine. Nor was the defect corrected at hearing. Rather, Executive Vice President Tim Orlowski conceded that there were several newer employees who had signed the petition, and he was unfamiliar with their signatures (Tr. 108-110).[10] Further, two of the individuals at issue, Harve Neace and Emil Sterczek, were identified as "working supervisors" but little clarification was provided as to their daily duties or whether these individuals were statutory supervisors, and thus they may have been improperly included. (Tr. 109). Respondent was similarly unsuccessful in clarifying what the total unit was as of the time of withdrawal (Tr. 293-294; R 18). Orlowski could only testify that he directed Human Resources Ilona Zelazowska to prepare a "current census" for the Franklin Park shop around April 2014 but could not certify that the list was prepared based on then-current data as of April 2014 (Tr. 313). Zelazowska further admitted that she could only testify that the list was produced "sometime in 2014" (Tr. 299). No witness could certify with any certainty what the total number of unit employees as of July 10, 2014.

Because the signatures on the petition were neither authenticated at the time of withdrawal, nor was authentication later cured at the hearing, the total number of unit employees is unresolved. Respondent could not rely on this petition as evidence of actual loss of support. Accordingly, Respondent's withdrawal of recognition must fail.

IV. RESPONDENT'S REFUSAL TO PROVIDE ACCESS WAS UNLAWFULLY DENIED.

Union agent access to an employer's premises for purposes related to representation of the unit employees is a mandatory subject of bargaining. *Applebaum Industries,* 294 NLRB 981, 982 fn. 9 (1989). A "unilateral change in an employer's policy permitting access by union representatives to its premises is a unilateral change in the employees' terms and conditions of

---

[10] Although Respondent never clarified precisely who those newer employees were, Orlowski did not recognize at least Brandon De La Cruz or Coronol's signatures.

employment and is, ordinarily, unlawful." *Turtle Bay Resorts,* 355 NLRB 1272, 1272 (2010). See also *Ernst Home Centers, Inc.*, 308 NLRB 848, 849 (1992); *Frontier Hotel and Casino*, 323 NLRB 815, 818 (1997). Furthermore, an Employer may not categorically refuse to provide the Union access to its facility for a safety inspection. *EIS Brake Parts,* 331 NLRB No. 195 (2000).

When, as here, the parties are operating under unilaterally implemented terms, an employer may only institute unilateral changes if they are not "substantially different from, or greater than, any which the Employer has proposed during the negotiations." *NLRB v. Crompton-Highland Mills,* 337 U.S. 217, 225 (1949). In this case, the terms operable between the parties were those implemented in 2009 and 2012, and the Union access provisions in Articles 20 and 21 were not changed (GC 4; R 3). Jose Gudino testified he made an access request on July 10, 2014 for the Union's safety team to visit to Respondent's plant based on member feedback regarding safety concerns following an OSHA inspection and numerous – 80 to 100 – citations against Respondent, and the Union sought the inspection for assurances the violations had been cured (Tr. 246-47, 254-55, 261; GC 14. Respondent denied the Union's request based upon its withdrawal of recognition from the Union on the same date, informing the Union that, "the union no longer has any right to conduct the inspection to which you refer" effectively unilaterally obliterating the access clause that had been operational for five years (Tr. 248, GC 14). Unilateral changes that impair a representative's ability to represent employees constitute a violation of Section 8(a)(5). *Ernst Home Centers, supra* at 848-849.

In this case, the Union was responding to requests by employees to conduct a safety inspection, matters which the Board has equated with the most legitimate of concerns. *Detroit Newspaper Agency,* 317 NLRB 1071 (1995); *American National Can,* 293 NLRB 901, 904 (1995); *Minnesota Mining Co.,* 261 NLRB 27 (1982). In *EIS Brake Parts,* 331 NLRB No. 195

(2000), the Board affirmed the ALJ decision that the Union's requested desire to have an International safety expert perform an inspection at the facility after it was prompted by employee concerns was warranted and could not be refused outright. *Id.* at *57.

In this case, Respondent presented no evidence to contradict its unilateral change to the policy to permit access by union representatives to its premises. Nor did Respondent raise any specific property right concerns for the rationale for their denial. Rather the uncontroverted evidence establishes that Respondent unlawfully withdrew recognition from the Union, it also unilaterally changed policy and denied the Union access to conduct an inspection after there were OHSA citations and other safety concerns that the Union wanted to ensure were remediated. Thus, as in *EIS*, the Respondent should be ordered to provide access to the Union and work with them to set mutually acceptable and reasonable times to perform their safety inspection.[11]

V. CONCLUSION

The record in this case clearly demonstrates that Respondent bargained in bad faith with no intent to reach agreement with the Union. The uncontroverted evidence is that Respondent

---

[11] The General Counsel did not allege the denial of the request for access as a specific unilateral change by the Respondent in the Complaint. However, the oversight is not fatal because the issue was plead as an 8(a)(5) violation in paragraph IX of the Complaint. At the hearing, testimony was elicited by both parties about the circumstances surrounding the request for access, the basis for it, and the Respondent's denial. The Board has held that it "may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales, Inc.* 296 NLRB 333, 334 (1989). In *Gulf & Western Mfg.*, 286 NLRB 1122 (1987), the Board found that Respondent had committed an unalleged 8(a)(3) allegation where the matter had been fully litigated at hearing. In that case, the Complaint merely involved an 8(a)(5) violation and yet the Board found that all of the elements of 8(a)(3) had been explored at hearing and so the Board ordered a remedy on the unalleged conduct. Here, the issue was in fact identified as an 8(a)(5) violation and thus Respondent was on notice that this constituted bad faith bargaining. Further, the facts involving the basis for the request and the Respondent's reaction from previous requests for access were fully developed and fully litigated at the hearing. *Williams Pipeline Co.*, 315 NLRB 630 (1994); *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989). Thus, the Board may find the violation based on the issues litigated as well as those alleged in the complaint. *Southwire Co.*, 282 NLRB 916 (1987); *C & E Stores*, 221 NLRB 1321 fn. 3 (1976).

entered bargaining in 2013 with a take-it-or-leave it proposal, refused to engage in discussion with the Union about its proposals, relied on a false 180,000 ton production threshold to discuss wages, claimed an inability to pay the Union's demands, and made specific factual representations about its bargaining position, and then refused to substantiate its assertions and permit the Union the meaningfully evaluate the claims. For all of those reasons and based upon the record evidence in this case, Counsel for the General Counsel respectfully requests that a Decision issue finding that Respondent violated Sections 8(a)(1) and 8(a)(5) of the Act. Respondent should be ordered to post an appropriate notice in English and Polish to advise unit employees of Respondent's violations, and any other remedy warranted in this case. The General Counsel's Recommended Order is attached hereto as Exhibit A.

DATED at Chicago, Illinois, this 15th day of June, 2015.

Respectfully submitted,

/s/ Melinda S. Hensel

Melinda S. Hensel
Counsel for the General Counsel
National Labor Relations Board
Region 13
209 S. LaSalle St., Suite 900
Chicago, IL 60604
Phone: 312-886-4886
Fax: 312-886-1341
E-mail: melinda.hensel@nlrb.gov

EXHIBIT A

GENERAL COUNSEL'S RECOMMENDED ORDER

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- ☐ Form, join, or assist a union;
- ☐ Choose a representative to bargain with us on your behalf;
- ☐ Act together with other employees for your benefit and protection;
- ☐ Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from and fail and refuse to recognize and bargain with Chauffeurs, Teamsters, and Helpers Local 150, International Brotherhood of Teamsters (the Union), as the exclusive collective bargaining representative of our employees in the following appropriate Unit:

> All full-time and regular part-time production, maintenance, and shipping and receiving employees employed by the Employer at its facility currently located at 11355 Franklin Avenue, Franklin Park, Illinois; but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL NOT refuse to bargain in good faith with the Union by denying the Union's request for access to our Franklin Park, Illinois, facility to investigate health and safety concerns, including, but not limited to conducting a health and safety inspection.

WE WILL NOT refuse to provide the Union with information that is relevant and necessary to its role as your bargaining representative.

WE WILL NOT bargain in bad faith with the Union as the exclusive collective-bargaining representative of the Unit identified above.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of our Unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. On resumption of bargaining, the Union's status as the exclusive collective-bargaining representative of the Unit shall be extended for 12 months thereafter, as if the initial year of the certification has not expired. The Unit is as follows:

All full-time and regular part-time production, maintenance, and shipping and receiving employees employed by the Employer at its facility currently located at 11355 Franklin Avenue, Franklin Park, Illinois; but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL, upon the Union's request, grant access to the Union's safety and health department representatives, to the entire production area within our Franklin Park, Illinois facility, for a reasonable period and at a reasonable time, to investigate health and safety concerns including but not limited to conducting a health and safety inspection.

WE WILL provide the Union with the financial information it requested on December 11, 2013:

- Audited financial statements for the past four years(2009-2012) certified by an outside CPA
- Financial reports for 2010-2013 to date
    - A detailed income statement
    - A detailed balance sheet
    - A statement of cash flows
- Sales by customer for each of the last 4 years (2009-2012) and current (2013) and projected sales for the next 3 years(2014-2016)
- An explanation of the Employer's business conditions, including specific changes that have occurred and the actual impact on the Employer's financial condition. Provide specific data, reports and analyses
- Federal and state tax returns for the last 4 years (2009-2012).

ARLINGTON METALS CORPORATION

____
(Employer)

Dated: _______________ **By:** ____
(Representative) (Title)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

ARLINGTON METALS CORPORATION

And

UNITED STEEL PAPER AND FORESTRY RUBBER MANUFACTURING ENERGY ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 1216, AFL-CIO, CLC AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION AFL-CIO (USW)

Case 13-CA-122273; 13-CA-125255; 13-CA-133055

AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

I, the undersigned agent of the National Labor Relations Board, being duly sworn, say that on June 15, 2015, I electronically filed the above-entitled document with the National Labor Relations Board, Division of Judges on the NLRB e-filing system and served the following individuals by **email**:

National Labor Relations Board
Division of Judges
1099 14th Street NW, Rm. 5400
Washington, DC 20570
c/o Robert J. Giannasi, Chief ALJ
Robert.Giannasi@nlrb.gov

Katharine A. Shaw
Assistant General Counsel
60 Blvd. of the Allies
Five Gateway Center, Suite 807
Pittsburgh, PA 15222
kshaw@usw.org

William Miossi
Derek G. Barella
Benjamin Ostrander
Winston & Strawn
35 W Wacker Dr
Chicago, IL 60601-5600
wmiossi@wintston.com
dbarella@winston.com
bostrander@winston.com

Stephen A. Yokich , Esq.
Cornfield And Feldman LLP
25 E Washington St, Ste 1400
Chicago, IL 60602-1803
syokich@cornfieldandfeldman.com

June 15, 2015	Melinda S. Hensel
Date	Name
	/s/ Melinda S. Hensel